

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JESSE HELTON; ALISHA PICCIRILLO;
CHAD LOWE; individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

FACTOR 5, INC.; FACTOR 5, LLC;
BLUHARVEST, LLC; WHITEHARVEST,
LLC; JULIAN EGGBRECHT; HOLGER
SCHMIDT; THOMAS ENGEL; and DOES 1-
100,

Defendants.

Case No: C 10-04927 SBA

**ORDER GRANTING MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Docket 97

Plaintiffs,¹ individually and on behalf of all others similarly situated, bring the instant action against Defendants to recover unpaid wages and other benefits under state and federal law. The parties are presently before the Court on Plaintiffs' motion for partial summary judgment against the individual Defendants² on their minimum wage claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206. Dkt. 97. The individual Defendants oppose the motion. Dkt. 113. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS Plaintiffs' motion for partial summary judgment, for the reasons stated below. The Court,

¹ The named Plaintiffs are Jesse Helton ("Helton"), Alisha Piccirillo ("Piccirillo"), and Chad Lowe ("Lowe") (collectively, "Plaintiffs").

² The individual Defendants are Julian Eggebrecht ("Eggebrecht"), Holger Schmidt ("Schmidt"), and Thomas Engel ("Engel") (collectively, "individual Defendants").

1 in its discretion, finds this matter suitable for resolution without oral argument. See
2 Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

3 **I. BACKGROUND**

4 Because the parties are familiar with the facts of this case, the Court will only recite
5 those facts which are relevant to the resolution of the instant motion. The Court finds that
6 the following facts are undisputed.

7 Plaintiffs are former employees of Factor 5, a software and video game developer.
8 Helton was employed by Factor 5 as a Senior/Lead Programmer from on or about May 15,
9 2006 until on or about December 19, 2008. Lowe was employed by Factor 5 as a Producer
10 from on or about December 24, 2005 until on or about December 19, 2008. Piccirillo was
11 employed by Factor 5 as a Senior Technical Artist from on or about August 2002 until on
12 or about December 19, 2008. The individual Defendants founded Factor 5 and were the
13 owners, directors, and officers of Factor 5 at all relevant times.

14 On November 1, 2008, Factor 5 stopped paying its employees earned wages. On
15 December 19, 2008, Factor 5 terminated all of its employees. Factor 5 did not pay
16 Plaintiffs for the work they performed for Factor 5 from November 1, 2008 to December
17 19, 2008.

18 On January 21, 2009, Plaintiffs filed a class action complaint in the Superior Court
19 of California, County of Marin, to recover earned wages and other benefits due under
20 California law. On October 13, 2010, Plaintiffs filed a first amended complaint (“FAC”),
21 adding the individual Defendants as well as claims under the FLSA. On October 29, 2010,
22 the individual Defendants removed the action to this Court on the basis of federal question
23 jurisdiction. The parties are presently before the Court on Plaintiffs’ motion for partial
24 summary judgment against the individual Defendants on their minimum wage claim under
25 the FLSA.

26 **II. LEGAL STANDARD**

27 “A party may move for summary judgment, identifying each claim . . . or the part of
28 each claim . . . on which summary judgment is sought. The court shall grant summary

1 judgment if the movant shows that there is no genuine dispute as to any material fact and
2 the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). A material fact
3 is one that could affect the outcome of the suit under the governing substantive law.

4 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For a dispute to be “genuine,”
5 a reasonable jury must be able to return a verdict for the nonmoving party. Id.

6 The moving party’s burden on summary judgment depends on whether it bears the
7 burden of proof at trial with respect to the claim or defense at issue. When the party
8 moving for summary judgment would bear the burden of proof at trial, it must come
9 forward with evidence which would entitle it to a directed verdict if the evidence went
10 uncontroverted at trial. See C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants,
11 Inc., 213 F.3d 474, 480 (9th Cir. 2000). In such a case, the moving party has the initial
12 burden of establishing the absence of a genuine issue of fact on each issue material to its
13 case. Id. However, if the nonmoving party bears the burden of proof on an issue at trial,
14 such as an affirmative defense, the moving party need not produce affirmative evidence of
15 an absence of fact to satisfy its burden. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
16 The moving party may simply point to the absence of evidence to support the nonmoving
17 party’s case. Id.

18 Once the moving party has met its burden, the burden then shifts to the nonmoving
19 party to designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324;
20 Anderson, 477 U.S. at 256 (“a party opposing a properly supported motion for summary
21 judgment may not rest upon mere allegations or denials of his pleading, but must set forth
22 specific facts showing that there is a genuine issue for trial.”). A party asserting that a fact
23 is genuinely disputed must support the assertion by “citing to particular parts of materials in
24 the record, including depositions, documents, electronically stored information, affidavits
25 or declarations, stipulations (including those made for purposes of the motion only),
26 admissions, interrogatory answers, or other materials.” Fed.R.Civ.P. 56(c)(1) (A).

27 To carry its burden, the nonmoving party must show more than the mere existence
28 of a scintilla of evidence, Anderson, 477 U.S. at 252, and “do more than simply show that

1 there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co.,
2 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In fact, the nonmoving party must
3 come forward with affirmative evidence from which a jury could reasonably render a
4 verdict in the nonmoving party’s favor. Anderson, 477 U.S. at 252, 257. In determining
5 whether a jury could reasonably render a verdict in the nonmoving party’s favor, the court
6 must view the evidence in the light most favorable to the nonmoving party and draw all
7 justifiable inferences in its favor. Id. at 255. Nevertheless, inferences are not drawn out of
8 the air, and it is the opposing party’s obligation to produce a factual predicate from which
9 the inference may be drawn. Dias v. Nationwide Life Ins. Co., 700 F.Supp.2d 1204, 1214
10 (E.D. Cal. 2010).

11 To establish a genuine dispute of material fact, a Plaintiff must present affirmative
12 evidence; bald assertions that genuine issues of material fact exist are insufficient. Galen v.
13 County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007); see also F.T.C. v. Stefanchik,
14 559 F.3d 924 (9th Cir. 2009) (“A non-movant’s bald assertions or a mere scintilla of
15 evidence in his favor are both insufficient to withstand summary judgment.”). Further,
16 evidence that is merely colorable or that is not significantly probative, is not sufficient to
17 withstand a motion for summary judgment. Anderson, 477 U.S. at 249-250 (citations
18 omitted). “Conclusory, speculative testimony in affidavits and moving papers is
19 insufficient to raise genuine issues of fact and defeat summary judgment.” Soremekun v.
20 Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007); see also Nelson v. Pima
21 Community College, 83 F.3d 1075, 1081-1182 (9th Cir. 1996) (“[M]ere allegation and
22 speculation do not create a factual dispute for purposes of summary judgment”). If the
23 nonmoving party fails to show that there is a genuine issue for trial, “the moving party is
24 entitled to judgment as a matter of law.” Celotex, 477 U.S. at 323.

25 **III. DISCUSSION**

26 The FLSA requires employers to pay employees certain minimum hourly wages. 29
27 U.S.C. § 206(a). The FLSA provides that “[e]very employer shall pay to each of his
28 employees who in any workweek is engaged in commerce or in the production of goods for

1 commerce, or is employed in an enterprise engaged in commerce or in the production of
2 goods for commerce,” a minimum wage. Id. Any employer who violates § 206 “shall be
3 liable to the employee or employees affected in the amount of their unpaid minimum wages
4 . . . and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b).

5 In the instant motion, Plaintiffs move for summary judgment on their FLSA
6 minimum wage claim against the individual Defendants on the ground that there is no
7 genuine dispute as to any material fact and that they are entitled to judgment as a matter of
8 law because the individual Defendants admit that they (1) knew that Plaintiffs were
9 working for Factor 5 without pay in November and December 2008, and (2) did not pay
10 Plaintiffs for work performed during those months. Pls.’ Mot. at 8-12. In addition,
11 Plaintiffs contend that they are entitled to an award of liquidated damages in an amount
12 equal to their unpaid wages because the individual Defendants did not act in “good faith” in
13 failing to comply with the FLSA’s minimum wage requirements. Id. at 12-15.

14 In response, the individual Defendants concede that they were the owners and
15 managers of Factor 5, and that they are “employers” for purposes of liability under the
16 FLSA.³ Defs.’ Opp. at 1. The individual Defendants also concede that they did not pay
17 Plaintiffs for the work they performed for Factor 5 between November 1, 2008 and
18 December 19, 2008. Id. In other words, the individual Defendants admit that they violated
19 the FLSA’s minimum wage requirements. However, they oppose Plaintiff’s motion on four
20 grounds. First, the individual Defendants argue that their tender of a check to Plaintiffs for
21 the full amount of their minimum wages, plus interest, moots Plaintiffs’ minimum wage
22 claim under Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013). Id. at 9-10.
23 Second, the individual Defendants argue that the Plaintiffs are exempt from the FLSA’s
24 minimum wage requirements because Plaintiffs qualify as managers and/or creative
25 professionals. Id. at 8-9. Third, the individual Defendants argue that Plaintiffs are not

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27 ³ See Boucher v. Shaw, 572 F.3d 1087, 1091 (9th Cir. 2007) (“Where an individual
28 exercises ‘control over the nature and structure of the employment relationship,’ or
‘economic control’ over the relationship, that individual is an employer within the meaning
of the Act, and is subject to liability.”).

1 entitled to an award of liquidated damages because they acted with “good faith” within the
2 meaning of the FLSA. Id. at 10-14. Fourth, the individual Defendants argue that there are
3 triable issues of material fact that preclude summary judgment on the issue of whether
4 Plaintiffs are entitled to an award of liquidated damages. Id. at 6-8. The individual
5 Defendants’ arguments are addressed in turn below.

6 **A. Mootness**

7 The individual Defendants contend that partial summary judgment is inappropriate
8 because Plaintiffs’ FLSA minimum wage claim is moot under Genesis Healthcare as
9 Plaintiffs refused to accept a Rule 68⁴ offer that would have fully satisfied their claim.
10 Defs.’ Mot. at 9-10. The Court rejects this argument. Even assuming the individual
11 Defendants made such an offer, the Supreme Court did not address this issue in Genesis
12 Healthcare. See Genesis Healthcare, 133 S.Ct. at 1528-1529 (“While the Courts of Appeals
13 disagree whether an unaccepted offer that fully satisfies a plaintiff’s claim is sufficient to
14 render the claim moot, we do not reach this question, or resolve the split, because the issue
15 is not properly before us.”) (footnote omitted)). Moreover, the Ninth Circuit has recently
16 held that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff’s claim does
17 not render that claim moot. See Diaz v. First American Home Buyers Protection Corp.,
18 732 F.3d 948, 954-955 (9th Cir. 2013) (noting that once a Rule 68 offer lapses, it is “by its
19 own terms and under Rule 68, a legal nullity”).

20 **B. FLSA Exemption Defense**

21 The individual Defendants contend that Plaintiffs’ motion for partial summary
22 judgment should be denied because Plaintiffs are exempt employees that are not subject to
23 the FLSA’s minimum wage requirements as they were “creative professionals” and/or
24 managers. Defs.’ Mot. at 8-9.

25 _____
26 ⁴ Rule 68 provides that “[a]t least 14 days before the date set for trial, a party
27 defending against a claim may serve on an opposing party an offer to allow judgment on
28 specified terms, with the costs then accrued. If, within 14 days after being served, the
opposing party serves written notice accepting the offer, either party may then file the offer
and notice of acceptance, plus proof of service. The clerk must then enter judgment.”
Fed.R.Civ.P. 68(a).

1 The FLSA requires employers to pay its employees a certain minimum wage for any
 2 hours worked. 29 U.S.C. § 206(a). However, the FLSA exempts from the statute's
 3 protection employees who are "employed in a bona fide executive, administrative, or
 4 professional capacity." 29 U.S.C. § 213(a)(1). The FLSA grants the Secretary of Labor
 5 broad authority to promulgate regulations to define and delimit the scope of exemptions.
 6 Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1112 (9th Cir. 2001).

7 An exempt "professional employee" is an employee "[c]ompensated on a salary or
 8 fee basis at a rate of not less than \$455 per week . . . [w]hose "primary duty is the
 9 performance of work . . . "[r]equiring invention, imagination, originality or talent in a
 10 recognized field of artistic or creative endeavor." 29 C.F.R. § 541.300(a). "The exemption
 11 does not apply to work which can be produced by a person with general manual or
 12 intellectual ability and training." 29 C.F.R. § 541.302(a). "[T]he work performed must be
 13 'in a recognized field of artistic or creative endeavor.' This includes such fields as music,
 14 writing, acting and the graphic arts." 29 C.F.R. § 541.302(b). "[E]xemption as a creative
 15 professional depends on the extent of the invention, imagination, originality or talent
 16 exercised by the employee. Determination of exempt creative professional status,
 17 therefore, must be made on a case-by-case basis." 29 C.F.R. § 541.302(c).⁵

18 An exempt "executive employee" is an employee:

19 (1) Compensated on a salary basis at a rate of not less than \$455 per week . .
 20 ., exclusive of board, lodging or other facilities;

21 ⁵ 29 U.S.C. § 541.302(c) provides:

22 This requirement generally is met by actors, musicians, composers,
 23 conductors, and soloists; painters who at most are given the subject matter of
 24 their painting; cartoonists who are merely told the title or underlying concept
 25 of a cartoon and must rely on their own creative ability to express the
 26 concept; essayists, novelists, short-story writers and screen-play writers who
 27 choose their own subjects and hand in a finished piece of work to their
 28 employers (the majority of such persons are, of course, not employees but
 self-employed); and persons holding the more responsible writing positions in
 advertising agencies. This requirement generally is not met by a person who
 is employed as a copyist, as an 'animator' of motion-picture cartoons, or as a
 retoucher of photographs, since such work is not properly described as
 creative in character.

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a)(1)-(4). In order to be an exempt executive employee, an employee's primary duty "must be the performance of exempt work." See 29 C.F.R. § 541.700(a).

An employee's "primary" duty is "the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole."⁶ 29 C.F.R. § 541.700(a). "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee." 29 C.F.R. § 541.700(b). "[E]mployees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement" and will be exempt from the FLSA's protections. Id. "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2.

FLSA exemptions are construed narrowly against the employer who seeks to assert them. Cleveland v. City of Los Angeles, 420 F.3d 981, 988 (9th Cir. 2005) (noting that the FLSA is construed liberally in favor of employees). Further, an FLSA exemption will not

⁶ "Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." 29 C.F.R. § 541.700(a).

1 be found except in contexts “plainly and unmistakably” within the given exemption’s terms
2 and “spirit.” Id. An employer has the burden of proving that an employee fits “plainly and
3 unmistakably” within the terms and spirit of an FLSA exemption. Id.; see Corning Glass
4 Works v. Brennan, 417 U.S. 188, 196-197 (1974) (“[A]n exemption under the Fair Labor
5 Standards Act is a matter of affirmative defense on which the employer has the burden of
6 proof.”); Hertz v. Woodbury County, Iowa, 566 F.3d 775, 783 (8th Cir. 2009) (“[T]he
7 application of an exemption under the Fair Labor Standards Act is a matter of affirmative
8 defense on which the employer has the burden of proof.”).

9 As an initial matter, Plaintiffs argue that the individual Defendants have waived their
10 FLSA exemption defense because it was not asserted in their answer to the FAC, and
11 because they will be prejudiced if the individual Defendants are allowed to assert such a
12 defense at this late stage of the litigation. While the general rule is that a defendant should
13 assert affirmative defenses in its first responsive pleading, Fed.R.Civ.P. 8(c), the Ninth
14 Circuit has “liberalized” the requirement that a defendant must raise affirmative defenses in
15 their initial responsive pleading. Magana v. Com. of the Northern Mariana Islands, 107
16 F.3d 1436, 1446 (9th Cir. 1997); see also Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011,
17 1023 (9th Cir. 2010). In the Ninth Circuit, a defendant “may raise an affirmative defense
18 for the first time in a motion for summary judgment only if the delay does not prejudice the
19 plaintiff.” Magana, 107 F.3d at 1446 (holding the district court erred in granting summary
20 judgment for defendants without determining whether their delay in raising the FLSA
21 exemption for employees “employed in a bona fide executive, administrative, or
22 professional capacity” prejudiced the plaintiff).

23 Here, the individual Defendants attempt to assert an FLSA exemption defense for
24 the first time approximately two years and nine months after the complaint was amended to
25 assert FLSA claims. The Court finds that the individual Defendants’ unexplained,
26 inordinate delay in raising this defense is prejudicial because Plaintiffs had no opportunity
27 to conduct discovery on this issue. The individual Defendants could have raised their
28 FLSA exemption defense long before the instant motion was filed in their answer to the

1 FAC or in a motion to dismiss or motion for summary judgment. Instead, they waited until
2 this late juncture to provide Plaintiffs notice of the defense. The individual Defendants
3 offer no justification for their failure to raise the defense in a timely manner. Under these
4 circumstances, the Court finds that the individual Defendants are prohibited from asserting
5 an FLSA exemption defense. See Ulin v. Lovell's Antique Gallery, 2010 WL 3768012, at
6 *13 (N.D. Cal. 2010) (prohibiting defendants from raising FLSA exemption defense for the
7 first time at the summary judgment stage).

8 Moreover, even if the individual Defendants were not prohibited from asserting an
9 FLSA exemption defense, they have failed to sustain their burden to establish a genuine
10 issue of material fact for trial. The only evidence relied upon by the individual Defendants
11 in support of this defense are statements made in the declarations submitted by Plaintiffs in
12 connection with the instant motion. See Defs.' Mot. at 9. Specifically, the individual
13 Defendants argue that Helton is an exempt "creative professional" and/or "executive"
14 employee because he avers that he "was responsible for writing code to implement game
15 features, as well as working with designers and other content creators to define features,
16 requirements, and workflow," citing Helton Decl. ¶ 2. Additionally, the individual
17 Defendants argue that Lowe is an exempt "creative professional" and/or "executive"
18 employee because he avers that, "[a]s a Producer, [he] was responsible for overall project
19 management for Defendants' game title/project, including supervising and tracking
20 assignments," citing Lowe Decl. ¶ 2. Finally, the individual Defendants argue that
21 Piccirillo is an exempt "creative professional" because she avers that, "as a Senior
22 Technical Artist," she "worked with designers, programmers, and artists, to ensure
23 technical integrity of game assets being produced by Defendants," citing Piccirillo Decl. ¶
24 2. The individual Defendants do not proffer any other evidence or argument supporting
25 their FLSA exemption defense.

26 The Court finds that the individual Defendants' showing is wholly inadequate to
27 withstand Plaintiffs' motion for partial summary judgment. The individual Defendants
28 have not come forward with affirmative evidence from which a jury could reasonably

1 render a verdict in their favor on their FLSA exemption defense. See Anderson, 477 U.S.
2 at 252, 257. The individual Defendants did not cite any evidence establishing that the
3 Plaintiffs were compensated on a salary basis at a rate of not less than \$455 per week.
4 Further, they failed to cite any evidence establishing the specific job duties of the Plaintiffs
5 or the amount of time that the Plaintiffs spent on their respective duties. Nor did the
6 individual Defendants attempt to explain how each Plaintiff's job duties satisfy the various
7 requirements of the FLSA exemptions they invoke. Instead, the individual Defendants
8 simply rely on the vague and generalized job descriptions provided by the Plaintiffs in their
9 respective declarations, which is insufficient to survive summary judgment. In re Brazier
10 Forest Prods., Inc., 921 F.2d 221, 223 (9th Cir. 1990) (Where the nonmoving party bears
11 the burden of proof on an issue at trial, such as an affirmative defense, the nonmoving party
12 must make a sufficient showing to establish the existence of evidence as to all elements
13 essential to its defense to avoid summary judgment); see Ale v. Tennessee Valley
14 Authority, 269 F.3d 680, 689 (6th Cir. 2001) ("[T]he determination of whether an
15 employee is exempt is an inquiry that is based on the particular facts of his employment and
16 not general descriptions."); 29 C.F.R. § 541.2 ("The exempt or nonexempt status of any
17 particular employee must be determined on the basis of whether the employee's salary and
18 duties meet the requirements of the regulations in this part.").

19 C. Good Faith Defense

20 Plaintiffs contend that they are entitled to an award of liquidated damages in an
21 amount equal to their unpaid wages under § 216(b). Pls.' Mot. at 12-15. The individual
22 Defendants disagree, arguing that they have a "good faith" defense to Plaintiffs' claim for
23 liquidated damages. Defs.' Opp. at 10-14. According to the individual Defendants, they
24 acted in good faith with respect to the FLSA's minimum wage requirements because they
25 reasonably relied upon their understanding of the advice of employment counsel and
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1 “human resource experts”⁷ in allowing Factor 5 employees to work in November and
 2 December 2008 when they believed that Factor 5 was about to enter into a new publishing
 3 contract for one of its video games, which would have paid all outstanding wages and
 4 would have made the survival of the company possible. Id.; see Eggebrecht Decl. ¶ 7;
 5 Engel Decl. ¶ 7; Schmidt Decl. ¶ 7.

6 Where an employer fails to pay minimum wages in violation of the FLSA, the
 7 employer is liable to the employee for an additional amount of damages equal to the
 8 minimum wages owed as liquidated damages. 29 U.S.C. § 216(b). Liquidated damages are
 9 not a penalty, but are compensation to the employee. Chao v. A-One Medical Services,
 10 Inc., 346 F.3d 908, 920 (9th Cir. 2003). “If the employer shows to the satisfaction of the
 11 court that the act or omission giving rise to such action was in good faith and that he had
 12 reasonable grounds for believing that his act or omission was not a violation of the [FLSA]
 13 . . . the court may, in its sound discretion, award no liquidated damages or” award a lesser
 14 amount. 29 U.S.C. § 260. “[T]he employer has the burden of establishing subjective and
 15 objective good faith in its violation of the FLSA.” Local 246 Util. Workers Union v. S.
 16 Cal. Edison Co., 83 F.3d 292, 297 (9th Cir. 1996). The employer has the burden to
 17 establish that it had “an honest intention to ascertain and follow the dictates of the FLSA,
 18 and that it had reasonable grounds for believing that its conduct complied with the FLSA.”
 19 Id. at 298.

20 “ ‘Good faith’ in this context requires more than ignorance of the prevailing law or
 21 uncertainty about its development. It requires that an employer first take active steps to
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23 ⁷ The individual Defendants provide no details regarding the specific advice they
 24 received from “human resource experts.” Instead, they simply aver that the “human
 25 resource experts” advised them that it was “lawful and appropriate for them to continue to
 26 operate Factor 5, Inc. as a business, even without funds on hand to pay employees, given
 27 the imminent publishing contract.” See Eggebrecht Decl. ¶ 7; Engel Decl. ¶ 7; Schmidt
 28 Decl. ¶ 7, Dkt. 116. Other than the individual Defendants’ conclusory and self-serving
 declarations, the individual Defendants did not proffer any evidence regarding the advice
 they received from “human resource experts.” This showing is insufficient to create a
 genuine issue of material fact for trial. See Soremekun, 509 F.3d at 984; see also F.T.C. v.
Publ’g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir. 1997) (“A conclusory, self-
 serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to
 create a genuine issue of material fact.”).

ascertain the dictates of the FLSA and then move to comply with them.” Reich v. Southern New England Telecommunications Corp., 121 F.3d 58, 71 (2d Cir. 1997). “To satisfy § 260, a FLSA-liable employer bears the ‘difficult’ burden of proving both subjective good faith and objective reasonableness, ‘with double damages being the norm and single damages the exception.’ ” Alvarez v. IBP, Inc., 339 F.3d 894, 910 (9th Cir. 2003). Where the employer fails to carry that burden, liquidated damages are mandatory. Id.

Here, the individual Defendants have failed to carry their burden to create a triable issue regarding their good faith defense. They have not come forward with affirmative evidence from which a jury could reasonably render a verdict in their favor on this issue. Anderson, 477 U.S. at 252, 257. The individual Defendants did not proffer any evidence establishing that they had an honest intention to ascertain and follow the dictates of the FLSA, and that they had objectively reasonable grounds for believing that their conduct complied with the FLSA.

It is undisputed that the individual Defendants were advised by employment counsel⁸ that Factor 5 had exposure to liability for failing to pay wages when due and owing, and that Factor 5 would be subject to substantial penalties under California law, in addition to wages and accrued vacation pay owed, if they terminated their employees without paying money due and owing.⁹ See Smith Decl., Exh. F (“Daijogo Dep.”) at 21:5-22:6; 69:9-13; 70:12-21, Dkt. 101. Based on this advice, the individual Defendants determined that it would be “legally preferable” to pay their employees when funds became available rather than terminate them immediately. Defs.’ Opp. at 13. According to the

⁸ The evidence proffered by Plaintiffs shows that Eggebrecht only spoke with employment counsel for 10 minutes regarding the potential liability arising out of Factor 5’s inability to pay its employees. See Daijogo Dep. at 21:1-18.

⁹ The individual Defendants argue that they acted in good faith because they were never advised that they had any obligation under the FLSA which would render them personally liable for minimum wages. However, the individual Defendants provide no authority holding that such circumstances constitute good faith. Indeed, good faith in the context of the FLSA requires more than ignorance of the prevailing law or uncertainty about its development; it requires that an employer first take active steps to ascertain the dictates of the FLSA and then move to comply with them. Reich, 121 F.3d at 71.

1 individual Defendants, they “understood” that they had been advised not to terminate their
2 employees while there was still an expectation that “funding would come through to pay
3 the payroll.” Id. at 12.

4 While courts have held that the advice of counsel can in some circumstances support
5 a good faith defense to liquidated damages,¹⁰ the individual Defendants’ have failed to
6 demonstrate that they had reasonable grounds for believing that their conduct complied
7 with the FLSA based on the advice of counsel. As noted above, the individual Defendants
8 were advised by employment counsel that it was unlawful to permit employees to work
9 without paying them their earned wages. Further, there is no evidence that the individual
10 Defendants took steps to ascertain the dictates of the FLSA and then moved to comply with
11 the FLSA. The individual Defendants have not cited any authority holding that a good faith
12 defense is applicable under the circumstances. Accordingly, the Court finds that Plaintiffs
13 are entitled to recover liquidated damages in an amount equal to the unpaid minimum
14 wages due under the FLSA.

15 **D. Genuine Issue of Material Fact for Trial**

16 The individual Defendants contend that partial summary judgment is inappropriate
17 because Plaintiffs have failed to demonstrate that there is no genuine issue of material fact
18 for trial regarding their entitlement to liquidated damages. Defs.’ Opp. at 6-8. Specifically,
19 the individual Defendants argue that there is a triable issue “as to what legal advice the
20 individual defendants were given as to continuing to permit [Factor 5] employees to
21 continue working without pay.” Id. at 7. According to the individual Defendants, the
22 deposition testimony of their former employment counsel, Daijogo, is contradictory
23 because while she testified that she never advised “anybody at Factor 5 that it was
24 appropriate to continue to permit employees to work for no wages,” she also testified that
25 she never advised “anybody at Factor 5 that it was *unlawful* to continue to permit
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28 ¹⁰ See, e.g., Featsent v. City of Youngstown, 70 F.3d 900, 906-907 (6th Cir.1995)
(collecting cases on advice of counsel as grounds for denying liquidated damages).

1 employees to work without being paid their earned wages.” Id. at 7-8 (emphasis added).
2 The Court rejects this argument.

3 A review of Daijogo’s deposition testimony reveals that the individual Defendants’
4 argument is frivolous. As pointed out by Plaintiffs, Daijogo made several changes to her
5 deposition transcript following her deposition, one of which was to clarify the
6 “contradiction” pointed out by the individual Defendants. After her deposition was taken,
7 Daijogo clarified that she did not advise anybody at Factor 5 that it was *lawful* to continue
8 to permit employees to work without being paid their earned wages. See Smith Supp.
9 Decl., Exh. A, Statement of Changes to Deposition Testimony of Third Party Witness
10 Daijogo & Pedersen, LLP, Dkt. 118-1. Further, Daijogo expressly testified that she
11 informed Factor 5 that it was unlawful to permit employees to continue to work without
12 paying them their earned wages. See Smith Decl., Exh. F at 21:5-22:6; 69:9-13; 70-12-21.
13 Accordingly, the individual Defendants have failed to demonstrate that a genuine issue of
14 material fact exists for trial regarding Plaintiffs’ entitlement to liquidated damages.

15 **E. Damages**

16 Plaintiffs contend that they are each entitled to an award of damages in the amount
17 of \$3,353.60. Pls.’ Mot. at 15. Plaintiffs reach this figure by first multiplying the federal
18 minimum wage rate in November and December 2008 by the days and hours they worked
19 for Factor 5 in those months: \$6.55 (minimum wage)¹¹ x 32 (days) x 8 (hours per day) =
20 \$1,676.80. Id. Next, Plaintiffs double the amount of their unpaid wages to account for
21 liquidated damages: \$1,676.80 x 2 = \$3,353.60. Id. The individual Defendants do not
22 dispute Plaintiffs’ damages calculations. Accordingly, because it is undisputed that
23 Plaintiffs worked 32 days in November and December 2008 for 8 hours a day and were not
24 paid a minimum wage, and because Plaintiffs are entitled to an award of liquidated
25 damages in an amount equal to their unpaid minimum wages due under the FLSA, the
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28 ¹¹ 29 U.S.C. § 206(a)(1).

1 Court finds that each Plaintiff is entitled to an award of damages in the amount of
2 \$3,353.60 for their FLSA minimum wage claim.

3 **IV. CONCLUSION**

4 For the reasons stated above, IT IS HEREBY ORDERED THAT:

5 1. Plaintiffs' motion for partial summary judgment on their FLSA minimum
6 wage claim against the individual Defendants is GRANTED. Helton, Piccirillo, and Lowe
7 are each awarded \$3,353.60 in damages.

8 2. This Order terminates Docket 97.

9 IT IS SO ORDERED.

10 Dated: 2/10/2014


11 SAUNDRA BROWN ARMSTRONG
12 United States District Judge
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